Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits

BRIEF AMICI CURIAE OF AMERICAN JEWISH COMMITTEE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, UNION FOR REFORM JUDAISM, AND CENTRAL CONFERENCE OF AMERICAN RABBIS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	8
I. A SHOWING OF "SUBSTANTIAL BURDEN" REQUIRES MORE THAN AN OBJECTOR'S BELIEF, HOWEVER SINCERE, THAT HIS OR HER RELIGIOUS EXERCISE IS BEING SUBSTANTIALLY BURDENED	8
II. THE BURDEN TO BE MEASURED HERE IS THE BURDEN ASSOCIATED WITH USING THE OPT-OUT ACCOMMODATION, NOT THE MONETARY FINES IMPOSED FOR NON-COMPLIANCE	16
III. PETITIONERS' CLAIMED BURDEN FROM THE KNOWLEDGE THAT GIVING NOTICE OF THEIR OBJECTION WILL RESULT IN OTHERS PROVIDING THE COVERAGE TO WHICH THEY OBJECT IS NOT ENOUGH TO INVOKE RFRA SCRUTINY	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page(s)

Bowen v. Roy,
475 U.S. 693 (1986) 13, 22

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) ..... *passim*

City of Boerne v. Flores,
521 U.S. 507 (1997) 9

Cutter v. Wilkinson,
544 U.S. 709 (2005) 17, 18

E. Texas Baptist Univ. v. Burwell,
793 F.3d 449 (5th Cir. 2015) 14

Employment Div., Dept. of Human Resources of Ore. v. Smith,
494 U.S. 872 (1990) 1, 8, 12, 13

Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.,
778 F.3d 422 (3d Cir. 2015) 14

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegtal,
546 U.S. 418 (2006) 8, 13, 17, 18

Kaemmerling v. Lappin,
553 F.3d 669 (D.C. Cir. 2008) 11

Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell,
794 F.3d 1151 (10th Cir. 2015) 14, 18

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 12, 13, 22

TABLE OF AUTHORITIES—Continued

Page(s)

Mahoney v. Doe,
642 F.3d 1112 (D.C. Cir. 2011) 13

Priests For Life v. U.S. Dep't of Health & Human Servs.,
772 F.3d 229 (D.C. Cir. 2014) 9, 14

Navajo Nation v. U.S. Forest Serv.,
535 F.3d 1058 (9th Cir. 2008) 9

Sherbert v. Verner,
374 U.S. 398 (1963) 13, 22

Thomas v. Review Bd.,
450 U.S. 707 (1981) 11, 12, 13

United States v. Menasche,
348 U.S. 528 (1955) 14

Weir v. Nix,
114 F.3d 817 (8th Cir. 1997) 9

Wheaton Coll. v. Burwell,
134 S. Ct. 2806 (2014) 10

CONSTITUTION

U.S. Const. amend. I 8, 13, 21, 22

STATUTES AND REGULATIONS

42 U.S.C. § 300gg–13(a) 10

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148 (March 23, 2010) 3

Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended,
42 U.S.C. §§ 2000bb *et seq*. ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C. § 2000bb-1(a) 3, 8, 9, 12

42 U.S.C. § 2000bb-1(b) 8, 9, 12

42 U.S.C. § 2000bb-1(c)..... 9

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.* 18

Health Resources and Services Administration Guidelines, 77 Fed. Reg. 8725 (Feb. 15, 2012).....*passim*

26 C.F.R. § 54.9815-2713(a)(1)(iv) 20

26 C.F.R. § 54.9815-2713A..... 4

29 C.F.R. § 2590.715-2713(a)(1)(iv) 20

29 C.F.R. § 2590.715–2713A (2015)..... 10

29 C.F.R. § 2590.715–2713A(b)..... 10

29 C.F.R. § 2590.715–2713A(c) 10

45 C.F.R. § 147.130(a)(1)(iv) 20

45 C.F.R. § 147.131 10

78 Fed. Reg. 39,870 (July 2, 2013)..... 10

79 Fed. Reg. 51,092 (Aug. 27, 2014) 10

COURT FILINGS

Brief Amici Curiae of American Jewish Committee and Jewish Counsel for Public Affairs in Support of the Government. *Sebelius v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 WL 333892 (Jan. 28, 2014)..... 2

TABLE OF AUTHORITIES—Continued

Page(s)

Brief of The American Jewish Committee, *et al.* in Support of Respondents, *Dept. of Human Resources v. Hibbs*, No. 01-1368, 2002 WL 31444460 (Oct. 25, 2002) 2

OTHER AUTHORITIES

139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) 11, 12

BLACK'S LAW DICTIONARY (6th ed. 1990)..... 14

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) 14

OXFORD DICTIONARY OF CURRENT ENGLISH (8th ed. 1992) 14

Statement of Rev. Oliver S. Thomas, Religious Freedom Restoration Act of 1993: Hearing on S. 2969 Before the H. Comm. on the Judiciary, 103d Cong. 1 (1993)..... 1

INTEREST OF *AMICI*[1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its core mission is to enhance the well-being of the Jewish people through the advancement of human rights and democratic values. AJC views both religious liberty and the equal rights of women as basic American values essential to this mission.

AJC has a long-standing commitment to religious freedom. AJC was one of the original supporters of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), restoring the compelling interest test in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). As AJC explained at the time, the absence of strong protections for freedom of religion in the wake of *Smith* invited governments to "run roughshod over religious conviction." *See* Religious Freedom Restoration Act of 1993: Hearing on S. 2969 Before the H. Comm. on the Judiciary, 103d Cong. 1 (1993) (statement of Rev. Oliver S. Thomas, appearing on

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[1]No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. On December 14 and 15, 2015, the Clerk of this Court docketed Petitioners' and Respondents' respective blanket consents to the filing of *amicus curiae* briefs in support of either or neither party.

behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee). AJC views the protections afforded by RFRA as no less important today than at the time of its enactment.

AJC's commitment to equality for women is likewise integral to its history and mission. AJC regularly files *amicus* briefs before this Court and others in opposition to unequal treatment of women and other forms of gender bias. *See, e.g., Sebelius v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 WL 333892 (Jan. 28, 2014), Brief Amici Curiae of American Jewish Committee and Jewish Counsel for Public Affairs in Support of the Government; *Dept. of Human Resources v. Hibbs*, No. 01-1368, 2002 WL 31444460 (Oct. 25, 2002), Brief of The American Jewish Committee, *et al.* in Support of Respondents. Additionally, through its Jacob Blaustein Institute for the Advancement of Human Rights, AJC has been a leading voice calling attention to human rights issues of core importance to the Jewish community, including the promotion of equality for women.

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of 16 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, the JCPA is dedicated to safeguarding the rights of Jews throughout the world; upholding the safety and security of the State of Israel; and protecting, preserving, and promoting a just, democratic, and pluralistic society.

The Union for Reform Judaism ("URJ"), whose 900 congregations across North America includes 1.5 million Reform Jews, and the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 2,000 Reform rabbis, come to this

issue with a proud legacy of fighting for civil rights and social justice, including defending both religious freedom and the separation of church and state.

Thus, AJC, JCPA, URJ, and CCAR stand at the intersection of the competing interests in this case—religious freedom, gender equality, and reproductive freedom for women—and are strongly committed to each interest. Consistent with their missions, *amici* submit this brief in support of Respondents to express their view that the government's opt-out accommodation in connection with coverage of certain types of contraceptive care mandated under the Health Resources and Services Administration Guidelines, 77 Fed. Reg. 8725 (Feb. 15, 2012) (the "Mandate"), pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010), strikes the appropriate balance between religious freedom and the government's interest in providing coverage for women's preventive care. *Amici* therefore respectfully submit the accommodation does not substantially burden Petitioners' exercise of religion under RFRA.

SUMMARY OF ARGUMENT

These consolidated cases ask whether an opt-out policy specifically designed to accommodate the beliefs of religious objectors may nonetheless "substantially burden a person's exercise of religion" under RFRA, 42 U.S.C. § 2000bb-1(a), where the objectors sincerely believe compliance with the policy itself violates their religious beliefs. Petitioners say the answer is yes, based on an untenable reading of this Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Petitioners seek to stretch *Hobby Lobby* to impose RFRA's compelling

interest review any time an objector sincerely believes his or her religious exercise is being substantially burdened, regardless of whether such a burden is discernible by any measure other than the objector's *ipse dixit* that it is so. That reading is facially implausible, as it would give religious objectors the power not only to say what they sincerely believe (which is unquestionably their right), but also to unilaterally declare when their beliefs have been substantially burdened (which is not).

In *Hobby Lobby*, this Court's majority concluded that requiring for-profit corporations to violate their sincere religious beliefs in compliance with the Mandate by forcing them to "arrang[e] for" health insurance covering certain methods of contraception they find religiously objectionable, with "severe" economic consequences for their refusal to do so, "substantially burden[s]" their exercise of religion. *Id.* at 2775. Petitioners assert the same analysis applies to the government's opt-out accommodation for nonprofit religious objectors to the Mandate. Yet whereas the provisions of the Mandate at issue in *Hobby Lobby* made no accommodation for the religious objections of for-profit corporations, the accommodation procedure at issue here specifically permits religious nonprofit groups who oppose coverage for contraceptive services to opt out by submitting a written self-certification. 26 C.F.R. § 54.9815-2713A. Doing so triggers one of several mechanisms by which coverage for the contraceptive services will be provided through third parties—such as the objectors' health insurance issuers or third-party administrators—without the objectors' financial, managerial, or administrative involvement. *Id.*

Petitioners contend requiring objectors to submit this written certification, though imposing no obligation on the objectors to "arrange for" or otherwise provide contraceptive coverage themselves, nonetheless violates their sincere religious beliefs by triggering the same coverage through other agents using the objectors' plan infrastructures. And because Petitioners would still be subject to "severe" economic consequences for non-compliance with the Mandate should they refuse to follow the accommodation process, they contend the accommodation "substantially burden[s]" their religious exercise under *Hobby Lobby*.

Petitioners' construction of RFRA under *Hobby Lobby* is not viable, facially or logically. Though the contents of Petitioners' sincere religious beliefs are not subject to judicial countermand, this does not mean they can declare a substantial burden by fiat. RFRA's use of the phrase "substantially burden a person's exercise of religion" necessarily implicates more than the objector's assertion that his or her religious beliefs are offended. The contents of a person's religious beliefs require only the believer's sincerity. *Id.* at 2774. But the imposition of a "substantial burden" on a person's "exercise of religion," if those phrases are to have any meaning at all, requires the consideration of criteria beyond the objector's declaration that it is so. The manifestations of a substantial burden could take a variety of forms not present here—financial, volitional, administrative, managerial, or otherwise. And the manifestations of such a burden need not be secular—a substantial imposition on the objector's sincere religious exercise may also suffice—but in all events they must mean something more than the

personal conviction that one's religious beliefs are substantially burdened.

Thus, consistent with the text of RFRA and contrary to Petitioners' arguments, it is not just possible, but necessary, for courts to assess whether a policy "substantially burden[s]" an objector's exercise of religion, and this is not equivalent to second-guessing the contents of the objector's religious beliefs. RFRA could not function without this determination, lest every government action be subject to compelling interest scrutiny based on nothing more than a single religious objector's declaration of his or her theology. Here, Petitioners declare their beliefs are violated by the knowledge that the self-certification of their religious objections will cause their plan providers to provide the contraceptive coverage they find objectionable. Yet they offer no further showing of a substantial burden beyond their statement that it is so. Without questioning the sincerity of Petitioners' beliefs in this regard, this declaration is nonetheless insufficient to show that the accommodation procedure "substantially burdens" their religious exercise under RFRA, for three reasons:

First, it is clear that RFRA is not intended to hinder every law that offends one's beliefs or imposes trivial or inconsequential burdens on those beliefs; only those which "substantially burden" the objector's "exercise of religion" trigger the compelling interest test. Questioning whether a substantial burden upon religious exercise actually exists is not the same as questioning the sincerity of an objector's belief that it does, and whether a substantial burden exists must in the final evaluation be decided by the courts rather than the objectors themselves.

Second, the burden to be measured in connection with the accommodation procedure is the burden associated with the use of that procedure, not the fines associated with general non-compliance with the Mandate. This is because the parties are questioning, and this Court is considering, the validity of the accommodation procedure (*i.e.*, whether it imposes a substantial burden) rather than whether the penalties for outright violation of the Mandate are a substantial burden. The validity of the opt-out accommodation procedure hinges on whether using that option imposes a substantial burden under RFRA, rather than on the severity of the penalty for general non-compliance with the Mandate. Were it otherwise, any accommodation under any law would be irrelevant for purposes of evaluation under RFRA, because the substantial burden test would, in essence, never take into account any religious accommodation provided.

Third, knowledge that Petitioners' plan providers or administrators will supply the objected-to coverage using Petitioners' plan infrastructure cannot be sufficient to establish the existence of a substantial burden under RFRA. The logical and necessary consequence of a finding that an objector's religious exercise can be substantially burdened by the independent actions of non-objecting third parties is that there must be "no law at all" upon objection. Rather than providing accommodation for religious beliefs, such an approach would effectively allow a single objector to impose his or her beliefs on all others (and the government) and to eliminate any law to which he or she objects. RFRA does not and cannot demand such a result.

For these reasons, the courts below correctly held that the opt-out accommodation at issue, even if contrary to Petitioners' sincere religious beliefs, does not substantially burden their religious exercise, and thus does not require application of RFRA's compelling interest test.

ARGUMENT

I. A SHOWING OF "SUBSTANTIAL BURDEN" REQUIRES MORE THAN AN OBJECTOR'S BELIEF, HOWEVER SINCERE, THAT HIS OR HER RELIGIOUS EXERCISE IS BEING SUBSTANTIALLY BURDENED

Congress passed RFRA in 1993 in reaction to *Smith*, which declared that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. 494 U.S. at 890. *Smith* held that the First Amendment does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* RFRA responded by adopting "a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegtal*, 546 U.S. 418, 424 (2006).

RFRA's restoration of the compelling interest test, however, does not support its indiscriminate application. Its provisions apply only to government acts which "substantially burden a person's exercise of religion[.]" 42 U.S.C. §§ 2000bb-1(a), (b). These elements—a "substantial[] burden" on a person's "exercise of religion"—are threshold considerations preceding application of the compelling interest test.

See id.; *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1072-73 (9th Cir. 2008) (stating that, under RFRA, the compelling interest test "is triggered only when there is a cognizable burden on the free exercise of religion"); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997) ("As an initial matter, a person claiming that a governmental policy or action violates his right to exercise his religion freely must establish that the action substantially burdens his sincerely held religious belief."); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 244 (D.C. Cir. 2014) ("In other words, if the law's requirements do not amount to a substantial burden under RFRA, that is the end of the matter."). The burden of establishing the existence of a substantial burden is on the objector. 42 U.S.C. § 2000bb-1(c). *See also City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

Petitioners seek to invoke RFRA's compelling interest review based primarily if not exclusively on their belief that they have been substantially burdened. Petitioners contend the government's opt-out accommodation procedure substantially burdens their religious exercise, essentially because they sincerely believe that they cannot comply with the policy in a manner consistent with their religious beliefs. Petitioners further insist that questioning whether the accommodation in fact imposes a substantial burden on their religious exercise is tantamount to second-guessing their religious beliefs. The flaw in this interpretation is exposed by consideration of what the opt-out accommodation actually requires of Petitioners, and how that requirement intersects with their religious exercise.

The accommodation procedure requires little more than execution and delivery of a self-certification

form or other kind of notice of opt-out in writing, to the objector's health insurance issuer, third-party administrator, or the government. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014); 78 Fed. Reg. 39,870 (July 2, 2013); 79 Fed. Reg. 51,092 (Aug. 27, 2014); 29 C.F.R. § 2590.715–2713A (2015). Where notice is given to the government, it must be accompanied by identification of the objector's health insurance issuer or third-party administrator. *Id.* Submission of the opt-out notice triggers alternative coverage, under which either the health insurance issuer or the third-party administrator provides separate payments for contraceptive services for plan participants and beneficiaries, without passing on the costs or other administrative responsibilities to the objector. *See* 42 U.S.C. § 300gg–13(a); 29 C.F.R. § 2590.715–2713A(b), (c); 45 C.F.R. § 147.131.

Thus, the accommodation procedure results in coverage by non-objecting third-party agents, without any financial, managerial, or administrative role or other oppression being imposed on the objector. Petitioners nonetheless argue that their sincerely held religious beliefs are substantially burdened by this procedure, because (i) they know that if they opt out, their plan providers or administrators will provide the contraceptive coverage to which they object, and (ii) they are required as part of their notice to the government to identify their health insurance issuers or third-party administrators to facilitate this process. (*See, e.g.*, Br. For Pet. In Nos. 15-35, 15-105, 15-119 & 15-191, at p. 52 ("[P]etitioners object to complying with the contraceptive mandate via the regulatory mechanism because of the consequences that their forced compliance is intended to produce."); Br. For Pet. In Nos. 14-1418, 14-1453 & 14-1505, at p.36 ("[F]iling

the document gives rise to a unique regulatory obligation, authorization, or incentive for Petitioners' own insurance companies to deliver the objectionable coverage to Petitioners' own students and employees in connection with Petitioners' own health plans."). This is not and cannot be sufficient to establish a substantial burden under RFRA.

Petitioners' error lies in their conflating of belief with burden. Though religious beliefs are solely a matter of the believer's sincerity, a substantial burden on religious exercise requires more. Government action which offends an objector's beliefs, but does not actually implicate his or her exercise of religion, does not trigger RFRA's compelling interest analysis. *See Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (holding that a "substantial burden" exists where the law "put[s] substantial pressure on an adherent to ***modify*** his behavior and to ***violate*** his beliefs" (emphases added)). Likewise, not all burdens trigger the RFRA analysis, only those involving a higher magnitude of intrusion. *See, e.g.*, 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch, noting that Congress added the word "substantially" prior to passage to clarify that only some burdens would violate RFRA); *Thomas*, 450 U.S. at 718 ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted."); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme.").

The distinction between belief and burden is important. Courts can (and should) assume the sincerity of Petitioners' belief that their religious exercise is substantially burdened by the accommodation process of self-certification and opt-out. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779 ("[It] is not for [courts] to say that their religious beliefs are mistaken or insubstantial."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-50 (1988) ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here . . . ."); *Thomas*, 450 U.S. at 713-16 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker correctly perceived the commands of their common faith."). But even a sincerely held religious belief that one's religious exercise is being substantially burdened by a particular law or policy logically cannot be self-executing for purposes of RFRA. Were it otherwise, that assertion would (a) be recursive and (b) invalidate all laws by fiat of the objector: "My sincerely held religious belief is substantially burdened by this law because I have a sincerely held religious belief that my sincerely held religious belief is substantially burdened by this law."

Both the plain language of RFRA—which specifically refers to "substantial burden" rather than merely "burden" and to "exercise of religion" rather than "religious belief"—and the changes made to the statute's text in this regard make clear that RFRA's compelling interest review is not triggered by every offense to one's religious beliefs. *See* 42 U.S.C. §§ 2000bb-1(a), (b); 139 Cong. Rec. S14352. To the contrary, in enacting RFRA, Congress expressly adopted the pre-*Smith* standard, which also provided that not all burdens were sufficient to warrant an

exemption or other accommodation. *See e.g.*, *Gonzales*, 546 U.S. at 424 (2006) (RFRA adopted "a statutory rule comparable to the constitutional rule rejected in *Smith*."); *Thomas*, 450 U.S. at 718 ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted."); *Lyng*, 485 U.S. at 451-52 ("However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."); *Bowen v. Roy*, 475 U.S. 693, 699-700 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."); *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.").

As such, belief in the existence of a substantial burden, however sincere, logically cannot be the standard by which an actual "substantial burden" under RFRA is judged, as it would impermissibly allow any objector to personally establish the meaning of "substantial" in any given case by reference to his or her own beliefs, no matter how slight that burden may actually be and without regard to the actual imposition, if any, on the objector's religious exercise. *See, e.g.*, *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) ("In adhering to RFRA's plain text [requiring that a burden be 'substantial,'], it avoids expanding RFRA's coverage beyond what Congress intended, preventing RFRA claims from being reduced into questions of fact,

proven by the credibility of the claimant."); *see also Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) ("If plaintiffs could assert and establish that a burden is 'substantial' without any possibility of judicial scrutiny, the word 'substantial' would become wholly devoid of independent meaning. Furthermore, accepting any burden alleged by Plaintiffs as 'substantial' would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise." (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

Instead, the question whether a law or a particular aspect thereof imposes a "substantial burden" under RFRA must be measured by the courts, applying the facts presented—as every decision before the Court in this appeal has held. *See Little Sisters of the Poor*, 794 F.3d at 1176; *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 456-58 (5th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015); *Priests For Life*, 772 F.3d at 247. RFRA's very use of the word "burden" as its litmus test requires this result; the ordinary meaning of the word "burden" demands an external onus or oppression, not just subjective offense. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 152 (10th ed. 1993) ("**burden** . . "1 something that is carried; load; duty, responsibility 2 something oppressive or worrisome"); OXFORD DICTIONARY OF CURRENT ENGLISH 106 (8th ed. 1992) ("**burden** . . . "1 load, esp. a heavy one. 2 oppressive duty, expense, emotion, etc."); BLACK'S LAW DICTIONARY 196 (6th ed. 1990) ("**Burden**. . Something that is carried. Something oppressive or worrisome.").

This hardly leaves objectors bereft of opportunities to demonstrate a substantial burden. The potential measures of substantial burden are myriad. A law may burden an objector's religious exercise through secular impositions such as financial sanction, managerial onus, or administrative obligation. Or it may burden religious exercise through non-secular means, such as restraining religious volition, punishing belief, or silencing religious expression. These types of burdens, as well as any number of other, as-yet unconsidered means, can and should continue to be addressed by the courts on a case-by-case basis. The essential point is that the existence of a substantial burden cannot be decided on the objectors' say-so, nor does judicial examination of a substantial burden necessarily require second-guessing the content of the objectors' beliefs. Rather, what RFRA calls for is ***acceptance*** of the objectors' sincerely-held religious beliefs, but ***examination*** of the imposition the challenged law or policy places upon the objectors' exercise of those beliefs.

Here, Petitioners have one but not the other. They believe the government's opt-out accommodation substantially burdens their religious exercise, but the accommodation's simple written certification process and insulation of objectors from any further involvement in or responsibility for providing the objected-to contraceptive coverage leaves them without any measure (or at least none Petitioners could identify) sufficient for a court to find a substantial burden. The two potential burdens discussed in Petitioners' briefs—monetary fines and use of their plan infrastructures—do not hold up.

II. THE BURDEN TO BE MEASURED HERE IS THE BURDEN ASSOCIATED WITH USING THE OPT-OUT ACCOMMODATION, NOT THE MONETARY FINES IMPOSED FOR NON-COMPLIANCE

Petitioners first seek to assert the same burden this Court's majority found sufficient in *Hobby Lobby*—the "pain of massive fines" Petitioners would incur if they refuse to follow the accommodation process and incur financial penalties for general non-compliance with the Mandate. (Br. For Pet. In Nos. 15-35, 15-105, 15-119 & 15-191, at p. 47; Br. For Pet. In Nos. 14-1418, 14-1453 & 14-1505, at p.39). *See Hobby Lobby*, 134 S. Ct. at 2775-76. But the burden of *Hobby Lobby* is not the burden Petitioners face, because they have been offered an accommodation the objectors in *Hobby Lobby* were not, and which this Court suggested in *Hobby Lobby* was satisfactory to remove the burden. *See id.* at 2782 (stating that the accommodation procedure for religious non-profits "does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion"). Petitioners here can be relieved of the "pain of massive fines," as the objectors in *Hobby Lobby* could not, simply by giving notice of their religious objections. The "substantial burden" to be measured, therefore, must be the burden (if any) imposed by the accommodation procedure, not the burden imposed for general non-compliance with the Mandate.

This shift in focus from the burden of general non-compliance with the Mandate to the burden of the accommodation is necessitated by the nature of the challenge before this Court. Petitioners are questioning, and this Court is considering, the

validity of the accommodation procedure (*i.e.*, whether it imposes a substantial burden) rather than whether the penalties for outright violation of the Mandate are a substantial burden. The fines about which Petitioners complain apply only in the event they fail to comply with the law twice, by both (a) not providing the coverage required by the Mandate, and (b) not opting out using the self-certification procedure. In *Hobby Lobby*, the correct comparison was between compliance with the Mandate and monetary fines for non-compliance, because those were the only choices available to the objectors in that case. Here, however, Petitioners have access to a third choice—an accommodation *Hobby Lobby* specifically identified as less burdensome. 134 S. Ct. at 2782.

This in turn means the validity of the opt-out accommodation hinges on whether using that procedure imposes a substantial burden under RFRA, not on the nature of the penalty for non-compliance in general. If the question of whether an ***accommodation*** to a law imposes a substantial burden were to hinge on whether ***refusal*** of the accommodation and ***violation*** of the law imposes a substantial burden, there would be no need to consider the accommodation at all. But this cannot be the standard because the point of the accommodation is to allow objectors a means through which they can avoid violating the law. *See, e.g.*, *Gonzales*, 546 U.S. at 436 (noting that RFRA allows people "to seek religious accommodations"); *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ("[A]n accommodation must be measured so that it does not override other

significant interests.")[2]; *Little Sisters of the Poor*, 794 F.3d at 1185 ("[T]he purpose of religious accommodation [is] to permit the religious objector both to avoid a religious burden and to comply with the law. If the plaintiffs wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation.").

Thus, the real question before the Court is one ***not*** addressed by *Hobby Lobby*: whether the burden imposed by the opt-out accommodation procedure is substantial. Because Plaintiffs can avoid the "massive fines" for violation of the Mandate through compliance with the accommodation, they must show a substantial burden on their exercise of religion arising from the accommodation, not the Mandate generally. The fines are not probative of that question.

III. PETITIONERS' CLAIMED BURDEN FROM THE KNOWLEDGE THAT GIVING NOTICE OF THEIR OBJECTION WILL RESULT IN OTHERS PROVIDING THE COVERAGE TO WHICH THEY OBJECT IS NOT ENOUGH TO INVOKE RFRA SCRUTINY

This leaves Petitioners with the claim that their sincerely held religious beliefs are substantially burdened by the knowledge that their plan providers

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[2] *Cutter* arose under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc, *et seq.*; however, RLUIPA "allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Gonzales*, 546 U.S. at 437.

or administrators will proceed to provide the contraceptive coverage to which they object if they opt out using the accommodation procedure. Petitioners do not argue that the notice procedure is itself onerous or oppressive, but rather that the result of following it—triggering contraceptive coverage by non-objecting third parties using their plan infrastructures—burdens them by violating their religious beliefs. (*See, e.g.,* Br. For Pet. In Nos. 15-35, 15-105, 15-119 & 15-191, at p. 52; Br. For Pet. In Nos. 14-1418, 14-1453 & 14-1505, at p.36).

However, the mere fact that non-objecting third parties will undertake the conduct Petitioners find objectionable if Petitioners opt out is not and cannot be sufficient to establish a "substantial burden," because all laws would fail under that standard. No matter the size of the burden to a religious objector, every law of general applicability remains subject to compliance by non-objectors, and the proposition that RFRA scrutiny is triggered where non-objecting third parties comply with the law in place of a religious objector would leave a single sincere objector with unbounded authority to interpose his or her individual religious beliefs as a general barrier to compliance with the law. To borrow Petitioners' analogy to conscientious objectors, Petitioners' argument is tantamount to allowing a conscientious objector to protest not only his own military service, but also that of other, non-conscientious objectors sent to serve in his place on the grounds that the result of his objection is to trigger military service by others which he continues to find objectionable.

This is so regardless of whether objectors such as Petitioners can be correctly described as "triggering" or "facilitating" compliance by a specific, non-

objecting third party as a consequence of using the opt-out. (*See, e.g.*, Br. For Pet. In Nos. 15-35, 15-105, 15-119 & 15-191, at pp.47-52; Br. For Pet. In Nos. 14-1418, 14-1453 & 14-1505, at pp.51-56). Others are always capable of, and subject to, complying with a law of general applicability, and this fact is especially clear where, as here, there is a broader legal right to the objected-to coverage. *See* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). The question is whether the accommodation imposes a substantial burden on Petitioners' religious exercise, not whether other, non-objecting third parties—whether or not part of the same plan "infrastructure" used by Petitioners—must carry that burden in their place.

Indeed, once the "substantial burden" determination is properly understood to require more than an *ipse dixit* inquiry into objectors' sincere beliefs, *see* § I, *supra*, it is difficult to identify how the accommodation "trigger" differs from other methods of providing contraceptive coverage which Petitioners find unobjectionable. Petitioners themselves point to the ability to obtain contraceptive coverage through separate health insurance purchased on an exchange or through other government programs as less restrictive means of satisfying the Mandate, and argue they should not be forced use the opt-out procedure because those options exist. (*See, e.g.*, Br. For Pet. In Nos. 15-35, 15-105, 15-119 & 15-191, at pp. 75-76; Br. For Pet. In Nos. 14-1418, 14-1453 & 14-1505, at pp.75-82). But in either event, what is happening is Petitioners' objection is triggering other means to provide the contraceptive coverage they find objectionable. Petitioners' argument thus proves too much with respect to the threshold question of substantial burden: eschewing the opt-out procedure

and instead forcing people into different health plans or various government programs still results in a non-objecting third party proceeding to provide the objected-to coverage.[3] The only difference is, under the accommodation procedure, objectors know who the provider is and the mechanism of the coverage. They cannot explain how that knowledge constitutes a substantial burden to them, other than by recursive reference back to their own beliefs.

Thus, the logical consequence of a finding that others' compliance with a law can impose a substantial burden on objectors' religious exercise is that there must be "no law at all" addressing whatever happens to be the contested issue. That is not how the free exercise of religion is intended to function:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities . . . will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfilment and with the tenets of their religion. The First Amendment must apply to all citizens

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[3] Petitioners' argument also puts the cart before the horse. While Petitioners may feel less restrictive means exist of fulfilling the Mandate than compliance with the accommodation, the compelling interest inquiry does not come into play unless Petitioners can meet their threshold burden of showing a substantial burden to their exercise of religion.

> alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.

Lyng, 485 U.S. at 451-52. *See also Bowen*, 475 U.S. at 699-700 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from [the challenged activity]."); *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.").

Instead, what is supposed to happen is exactly what the government's opt-out accommodation provides with respect to the Mandate: The law applies generally, and there is an accommodation for the objectors. An objector's knowledge that other, non-objecting third parties will proceed to provide that to which he or she objects, standing alone, simply is not and cannot be enough to qualify as a substantial burden under RFRA, lest all laws be capable of invalidation by a single objector's fiat.

CONCLUSION

A nation as large, diverse, and religiously inclusive as the United States simply could not function if it were required to accommodate every citizen's religious objections under all circumstances. Nor is that required by RFRA. Yet if an objector's sincerely held belief that his or her free exercise is

substantially burdened were sufficient to establish the existence of a substantial burden under RFRA, that is exactly what would come to pass. Moreover, where, as here, the alleged substantial burden is the knowledge that others will proceed to engage in the objected-to conduct, that burden cannot qualify as "substantial" for RFRA purposes. Otherwise, all laws would be capable of nullification by even a single religious objector. This is neither what Congress sought nor what the plain language of RFRA itself calls for, and should be rejected. The courts below correctly balanced RFRA's scales between free exercise of religion and the government's interest in providing coverage for women's preventive care, and their decisions should be affirmed.

Respectfully submitted,

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